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# The Constitutionality of Federal Aid to Sectarian Universities\*

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## I. Introduction

The validity of government aid to sectarian universities is becoming an important question in constitutional law. In 1963, Congress passed the Higher Education Facilities Act, providing for appropriations to institutions of higher learning for the construction of academic facilities.<sup>1</sup> Other state and federal programs provide additional aid to all colleges and universities, without excluding those affiliated with churches.<sup>2</sup> The constitutionality of this

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\* The original work on this article was done in report form at the request of the University of Santa Clara and its president, The Very Reverend Patrick A. Donohoe, S.J. The favorable response from Father Donohoe and other educators, together with the help and encouragement of the Editors of this Law Review, have caused us to adapt our results for publication, though our initial purpose was primarily to describe rather than prescribe.

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1. 77 Stat. 363 (1963), 20 U.S.C. §§ 701-57 (1964), *as amended*, 79 Stat. 1266 (1965), 80 Stat. 1240 (1966), 20 U.S.C. §§ 711-58 (Supp. II, 1965-66). The Act provides that "academic facilities" are not to include "any facility . . . to be used for sectarian instruction or as a place for religious worship" during the 20 year period of federal interest. 77 Stat. 374 (1963), 20 U.S.C. § 751 (a) (2) (C) (1964).

2. The Housing Act of 1950 provides for long-term loans at favorable interest rates for the construction of new buildings or the remodeling of buildings for dormitories, apartments, cafeterias, dining halls, student centers, or infirmaries. Ch. 94, § 401, 64 Stat. 77, 12 U.S.C. §§ 1749 (a)-(f) (1964), *as amended*, 79 Stat. 489 (1965), 12 U.S.C. §§ 1749 (c)-(g) (Supp. II, 1965-66).

The National Defense Education Act provides for federal funding of loans to students attending a public or other non-profit institution. 72 Stat. 1580 (1958), 20 U.S.C. §§ 401-592 (1964), *as amended*, 79 Stat. 1251 (1965), 80 Stat. 1245 (1966), 20 U.S.C. §§ 403-602 (Supp. II, 1965-66).

The G.I. Bill has recently been reinstated to cover veterans who have served in the Armed Forces since 1955. 30 Stat. 12 (1966), 38 U.S.C.A. §§ 1651-86 (Supp. 1966). Numerous state scholarship programs such as the one in California provide tuition scholarships to high school graduates to attend a university of their choice. CAL. EDUC. CODE §§ 31201-219 (West 1960).

aid is drawn into question by the language of that part of the first amendment that reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>3</sup>

The general issue of the constitutionality of government aid has not gone unnoticed. In *Horace Mann League of the United States v. Board of Public Works*,<sup>4</sup> the Maryland Court of Appeals found, in a 4 to 3 decision, that grants of construction funds by the State of Maryland to certain church-affiliated universities were unconstitutional: the aid was to institutions that were "sectarian" and therefore were precluded by the first amendment from receiving governmental aid. The constitutionality of the Higher Education Facilities Act itself was challenged prior to its passage.<sup>5</sup>

The Supreme Court has proceeded gingerly in this area, having denied certiorari and dismissed an appeal in *Horace Mann*.<sup>6</sup> Recently, however, the Court granted review of a New York case denying standing to taxpayers challenging the constitutionality of appropriations for parochial secondary schools.<sup>7</sup> Other cases on their merits are also pending, so the controversy will continue to confront the courts.<sup>8</sup>

The issue is anything but clear, as shown by the 4 to 3 decision in *Horace Mann*. But it is clear that millions of dollars of state and federal funds provided under numerous programs are presently being channeled to colleges and universities affiliated to varying degrees with religious organizations.<sup>9</sup> It is also clear that the increased costs of higher education cannot be met by tuition and fees alone. The availability of private gifts and income from endowments is obviously limited, and it is increasingly evident that aid from the state and federal governments is the only practical means of avoiding limitations on the growth of private institutions of higher learning and on the quality of education they can offer.

This need for government aid has been one of the factors that has led to the present critical self-examination of the purpose and the effectiveness of higher education at sectarian institutions. However, much of the present concern about the nature of these universities is not an outgrowth of the need for funds. The question of the constitutionality of government aid only serves to make more immediate the need to resolve substantial policy ques-

3. U.S. CONST. amend. I.

4. 242 Md. 645, 220 A.2d 51, *cert. denied and appeal dismissed*, 385 U.S. 97 (1966).

5. See generally S. REP. No. 557, 88th Cong., 1st Sess. (1963); 109 CONG. REC. 19401, 19467-74 (1963) (remarks of Senators Morse, Ervin and Cooper).

6. 385 U.S. 97 (1966). Notwithstanding the usual practice of not filing comments upon the denial of review, Justices Harlan and Stewart specifically noted that they would have granted review and set the case for argument.

7. *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967), *prob. juris. noted*, 88 S. Ct. 218 (1967).

8. See Note, 17 CATHOLIC U.L. REV. 242, 248, n.46 (1967).

9. SUBCOM. ON SCIENCE, RESEARCH AND DEVELOPMENT OF THE COMM. ON SCIENCE AND ASTRONAUTICS, THE FEDERAL GOVERNMENT AND HIGHER EDUCATION: CONTRACT GRANT AND LOAN PROGRAMS TO INSTITUTIONS AND INDIVIDUALS, 90th Cong., 1st Sess. (Comm. Print Serial B. 1967).

tions regarding the future of church-supported higher education—its inner vitality, its appeal to prospective unaffiliated students, its place in the pluralistic community. It is clear, of course, that attorneys cannot resolve these policy questions and this article does not purport to do so. It can, however, raise the legal issues that are relevant to such policy considerations and note that qualification for state and federal aid is only one factor to be considered.

While federal aid is an important factor, it would obviously be a mistake, as most educators realize, to make any decision based only on this one factor. Likewise, it is grossly unfair to interpret the present rethinking of the nature and role of church-supported higher education as a response solely to the need and desire for federal funds. On both counts it is clear that, even should no changes in the structure or operation of church-supported colleges be necessary to enable them to receive government aid—and there is a substantial possibility that this may be so—the policy questions will continue to exist and will demand serious consideration.

## II. *The Teaching of the Supreme Court*

The relevant background in this area is provided by a number of Supreme Court cases dealing with various facets of the relationship between church and state under the first amendment. One reason for the Court's slow movement in this area is the difficulty of formulating clear guidelines. As will be seen, cases—or language—can be found both supporting and calling into question the constitutionality of government grants to sectarian universities.

At the outset, it is important to distinguish between that provision of the first amendment providing that Congress shall make no law respecting an *establishment of religion*, and the provision that Congress shall make no law prohibiting the *free exercise of religion*. The question involved in *Horace Mann* and under the Higher Education Facilities Act is raised by the establishment clause. There is no question of a violation of anyone's freedom of religion, since college students need not attend a church-affiliated university or, for that matter, any university at all. This is to be distinguished from cases involving religious activities in public primary or secondary schools where attendance is usually compulsory.<sup>10</sup>

As has often been pointed out, however, the establishment clause and the free exercise clause are closely related, and in many ways are two sides of the same coin. The establishment of a religion may infringe the right of those who want to worship in another way. On the other hand, a state's protection of a

10. A classic decision involving interference with the free exercise of religion was *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). There, the Supreme Court held that a state law requiring the salute of the flags in public schools interfered with the free exercise of religion by Jehovah's Witnesses, who objected to the flag as an image within the prohibition of the 4th and 5th verses of *Exodus* 20 and who, therefore, refused to render the salute.

particular sect's freedom to worship may to some extent establish or recognize that religion or provide state recognition or support of religion in general, as opposed to atheism.

*Everson v. Board of Education*<sup>11</sup> is a landmark Supreme Court decision considering the constitutionality of government aid to church-supported educational institutions. The suit challenged state legislation allowing parents to be reimbursed for money spent to bus their children to parochial schools. The Court set forth the history of the first amendment and then propounded its famous, oft-quoted statement:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."<sup>12</sup>

The Court in *Everson* stressed that the state could not "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." The Court indicated, however, an awareness of the subtleties of the problem and the potential discrimination against those of given religious beliefs by continuing:

On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans . . . [etc.] or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.<sup>13</sup>

The Court then noted that the state statute "may" approach the "verge" of a state's power under the first amendment. Admitting that without this aid some children might not be sent to church schools, the Court stated that much the same purpose and result is accomplished by providing state paid policemen to protect children going to and from church schools. The states are not required, said the Court, to be hostile to churches, but only to be

11. 330 U.S. 1 (1947).

12. *Id.* at 15-16.

13. *Id.* at 16.

neutral in their relations with groups of religious believers and non-believers.

The Court referred to the holding in *Pierce v. Society of Sisters*<sup>14</sup> that parents had the right to send their children to sectarian schools meeting state requirements:

It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.<sup>15</sup>

The Court therefore upheld the use of state funds to transport children to parochial schools.

Years before *Everson*, the Supreme Court in *Cochran v. Louisiana Board of Education*,<sup>16</sup> held that a state could supply free textbooks to all children, whether they attended private or public schools. This has led commentators to explain *Everson* and *Cochran* on the theory that aid is permissible so long as it goes to the child and not to the institution.<sup>17</sup> The *Cochran* case, however, only involved the question whether the spending challenged was for a public purpose; no one challenged the validity of the grant under the first amendment.<sup>18</sup>

*Everson* was soon followed by two cases involving public school released-time programs for religious studies: *Illinois ex rel. McCollum v. Board of Education*,<sup>19</sup> holding that providing school time for religious instruction on public school premises was unconstitutional, and *Zorach v. Clauson*,<sup>20</sup> holding that a similar provision providing for religious instruction during the school hours, but not on public school property, was constitutional.

The Court in *McCollum* found that "[t]his is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."<sup>21</sup> The Court relied upon the compulsory attendance factor involved in state secondary education. In *Zorach*, the Court found that there was no evidence of coercion and upheld the

14. 268 U.S. 510 (1925).

15. *Everson v. Board of Educ.*, *supra* note 11, at 18.

16. 281 U.S. 370 (1930).

17. See Amdursky, *The First Amendment and Federal Aid to Church-Related Schools*, 17 SYRACUSE L. REV. 609 (1966); Comment, *The Supreme Court, The First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 88 (1963); Comment, *State Tax Exemptions and The Establishment Clause*, 9 STAN. L. REV. 366, 370 (1957).

18. The first amendment was not applied to the states until *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

19. 333 U.S. 203 (1948).

20. 343 U.S. 306 (1952).

21. *Illinois ex rel. McCollum v. Board of Educ.*, *supra* note 19, at 210.

State's released-time program, emphasizing that there was no use of public school classrooms.

Some years later, in 1961, the Court had before it four cases questioning the validity of Sunday closing laws, including *McGowan v. Maryland*<sup>22</sup> and *Braunfeld v. Brown*.<sup>23</sup> *McGowan* was decided under the establishment clause, no question of coercion arising. The Court upheld the laws on the ground that their admittedly religious character when first established had been replaced by the legitimate state need and interest in requiring a uniform day of rest every week for all employees. The fact that the day of rest chosen coincided with the religious observance of a particular religion did not require a contrary holding.

While the Court in *McGowan* looked to the existence of an adequate non-sectarian purpose for the laws in question, it cited with approval the statement in *Everson* that the state may give no aid directly to a religious institution. *McCollum* was distinguished on the ground that there was no coercion to attend religious services in *McGowan* and no tax monies were being used to aid religion.

In a separate opinion, Justices Frankfurter and Harlan foreshadowed future developments. They refused to rely on *Everson*, concurring specifically on the ground that a state statute that aids religion is not necessarily invalid. They stated that a state could not have as its primary goal the "affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion . . . ."<sup>24</sup>

Likewise, according to the Justices, if both religious and secular ends were furthered "by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be obtained by means which do not have consequences for promotion of religion—the statute cannot stand."<sup>25</sup> The concurring opinion continued by stating that once it was determined that a statute implemented "other substantial interests than the promotion of belief," the dictates of the establishment clause had been met.

To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted.<sup>26</sup>

[An] "establishment" contention can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear.<sup>27</sup>

22. 366 U.S. 420 (1961).

23. 366 U.S. 599 (1961).

24. *McGowan v. Maryland*, *supra* note 22, at 466.

25. *Id.* at 467.

26. *Id.* at 466.

27. *Id.* at 468.

In *Braunfeld*, members of the Orthodox Jewish faith claimed the Sunday closing law invaded their freedom of religion, thereby demonstrating the close relationship between the establishment clause and the free exercise clause. Chief Justice Warren, writing for himself and Justices Black, Clark and Whittaker, stated:

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.<sup>28</sup>

Thus, in the Sunday closing cases, six members of the Court felt that, at least on some issues, the question should be whether the state is serving secular or religious goals when it indirectly aids a given religion or religions by the passage of legislation.

Next, *Engel v. Vitale*<sup>29</sup> held unconstitutional the morning recitation in public schools of a prayer written by the New York State Board of Regents. The Court found there was no doubt that the use of such a prayer was a religious activity:

We agree with that contention [that the practice is unconstitutional] since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.<sup>30</sup>

Justice Douglas, concurring, gave his advisory opinion that no form of government financial aid to sectarian schools was constitutional. He included in a list of unconstitutional governmental assistance the G.I. Bill, the School Lunch Program, the World War II training of nurses in parochial schools, the Hill-Burton Hospital Construction Act and the use of NYA and WPA funds for parochial schools in the depression. Justice Douglas also observed that, in his opinion, *Everson* had been wrongly decided, notwithstanding the fact that he had been a member of the five man majority.

28. *Braunfeld v. Brown*, *supra* note 23, at 607.

29. 370 U.S. 421 (1962).

30. *Id.* at 425.



In 1963 the Supreme Court decided *School District v. Schempp*<sup>31</sup> and found that daily Bible reading and recitation of the Lord's Prayer in the public schools of Maryland and Pennsylvania violated the establishment clause. Justice Clark, writing for eight members of the Court, stated that the test under the establishment clause is:

[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.<sup>32</sup>

As authority for this proposition, Justice Clark cited the Court's opinions in *Everson* and *McGowan*. The Court found that the challenged exercises were a religious ceremony and were intended by the state to be so: "Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause."<sup>33</sup>

The Court also pointed out that it had been clearly established in *Everson* that no laws could be passed "which aid one religion, aid all religions, or prefer one religion over another." The Court rejected arguments for retaining Bible reading based on the secular purposes of inculcating moral values and teaching literature, noting the primary use of the Bible as a religious document.<sup>34</sup>

Justice Brennan concurred in the opinion of the Court, but switched emphasis from the establishment clause to the free exercise clause by maintaining that people had the right to choose to what educational institutions they would send their children:

In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative . . . . It is no proper function of the state or local government to influence or restrict that election.<sup>35</sup>

31. 374 U.S. 203 (1963).

32. *Id.* at 222.

33. *Id.* at 223.

34. Justice Douglas again set forth his separate opinion on the meaning of the establishment clause:

It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. . . .

*The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools. Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. (Emphasis in original.)*

*Id.* at 229.

35. *Id.* at 242.

Noting that *McGowan* was a case where the state was furthering "overwhelming secular ends," Justice Brennan argued there was nothing unconstitutional about tax exemptions "which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character."<sup>36</sup>

The quoted portions of these decisions demonstrate that the Supreme Court has been troubled by the complex nature of the problem and is struggling to draw meaningful guidelines as it moves from one fact situation to another. As Professor Kurland has stated: "Anyone suggesting that the answer [to the question of the constitutionality of federal aid to education], as a matter of constitutional law, is clear one way or the other is either deluding or deluded."<sup>37</sup>

### III. Standing

It may be some time before Professor Kurland and the rest of us find the answer clarified, since there has historically been a difficult question whether anyone has sufficient standing to challenge federal expenditures. In *Frothingham v. Mellon*,<sup>38</sup> the Court, while recognizing that taxpayers had standing in numerous state courts to challenge state appropriations, held that a federal taxpayer's interest in a federal appropriation was too minute for a finding of sufficient injury to give him standing. Justices Douglas, Reed and Burton in *Doremus v. Board of Education*,<sup>39</sup> a recent decision involving the free exercise clause of the first amendment, wanted to hold that, if a state court found sufficient interest to confer standing upon a plaintiff, the Supreme Court likewise should grant standing. The majority, however, refused to be bound by the state court's determination of standing.

In the past 20 years, numerous cases concerning challenges under the establishment of religion clause have been before the Supreme Court and sufficient standing has been found.<sup>40</sup> However, those cases involved the parents of children enrolled in schools where religious exercises were taking place at the behest of the state, or have concerned people prosecuted under the various laws challenged as invalid under the first amendment. On the other

36. *Id.* at 301. Also in 1963, the Court held that South Carolina could not refuse unemployment compensation benefits to a Seventh Day Adventist who would not work on Saturday as a result of her religious beliefs; see *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court stated that state action was permissible in this area if there was either no infringement of an individual's rights "... or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate ...'" *Id.* at 403.

37. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

38. 262 U.S. 447 (1923).

39. 342 U.S. 429, 435 (1952).

40. See cases discussed in text, Sec. II, *supra*.

hand, numerous federal expenditures in support of education, both public and private, have gone unchallenged, in many cases as a result of the difficulties of establishing standing. Such programs include the G.I. Bill,<sup>41</sup> the National School Lunch Act,<sup>42</sup> the National Defense Education Act<sup>43</sup> and tax deductions for gifts to religious institutions.<sup>44</sup>

As stated earlier, the Supreme Court recently noted probable jurisdiction in *Flast v. Gardner*.<sup>45</sup> In that case, a three judge panel of a federal district court ruled on the basis of *Frothingham* that residents of New York did not have standing to sue as federal taxpayers challenging the constitutionality of using federal funds to support parochial schools under the Elementary and Secondary Education Act of 1966.<sup>46</sup> The Court may well directly overrule *Frothingham*, or at least revise it to allow suits under the first amendment, thereby opening the courts to challenges directed against the Higher Education Facilities Act.

Even should the Court fail to revise its holdings on standing, there are numerous ways in which the issue of the constitutionality of the Higher Education Facilities Act may be raised.<sup>47</sup> The Act provides for a state coordinator to establish a program for the administration of the federal funds, and a priority system for construction of academic facilities with these funds. Therefore, a state taxpayer might well be able to sue in a state court to enjoin the use of state funds to finance such a state official. Another possibility is that a public university receiving a lower priority than a sectarian university could sue in either a state or a federal court, claiming that, but for the allegedly unconstitutional aid to a religious institution, the plaintiff school would have received the funds in question. Or a religious sect without affiliated colleges could sue to enjoin the administration of the plan on the ground that the use of these funds for religiously affiliated universities made such religions more desirable due to the improved educational facilities they offered members. Finally, a student at a public university that had received a

41. 80 Stat. 12 (1966), 38 U.S.C.A. §§ 1651-86 (Supp. 1966).

42. Ch. 281, 60 Stat. 230 (1946), 42 U.S.C. §§ 1751-60 (1964).

43. 72 Stat. 1580 (1958), 20 U.S.C. §§ 401-592 (1964), as amended, 79 Stat. 1251 (1965), 80 Stat. 1245 (1966), 20 U.S.C. §§ 403-602 (Supp. II, 1965-66).

44. INT. REV. CODE OF 1954 § 170.

45. 271 F. Supp. 1 (S.D.N.Y. 1967), *prob. juris. noted*, 88 S. Ct. 218 (1967).

46. Tit. I, 80 Stat. 1198, 20 U.S.C. §§ 241a-241m (Supp. II, 1965-66).

47. For an excellent discussion of some of the following points, see Note, 77 HARV. L. REV. 1353, 1360 (1964).

The Congressional opponents to the aid provided by the Higher Education Facilities Act of 1963 were acutely aware of the problem of standing. They attempted to include a provision to allow individual taxpayers or particular colleges affected by aid to sectarian institutions to challenge the constitutionality of the program, but these were defeated in Congress. See 109 CONG. REC. 19481 (1963) (remarks of Senator Ervin). There were some remarks to the effect that this amendment was unnecessary since the *Horace Mann* case, then pending in the lower Maryland courts, would inevitably present this issue to the Supreme Court. See 109 CONG. REC. 19481 (1963) (remarks of Senator Morse).

lower priority from the state coordinator than had a sectarian college could object on the ground that, but for the allegedly unconstitutional aid, the funds would have been given to the public institution and the student would have had better facilities, better dormitories, and so forth.

Even should there not be standing to obtain direct review in federal courts of government grants to higher education, there is no doubt that cases will continue to be brought in state courts by litigants who clearly have standing to challenge state expenditures.<sup>48</sup> This was the situation in *Horace Mann*. It would seem highly unlikely that, should such a case reach the Supreme Court, the Attorney General of the United States or the administrators of the various programs not directly challenged could ignore a clear mandate of the Supreme Court that government aid to sectarian universities was unconstitutional.

Of course, if litigants obtain standing to challenge the constitutionality of government aid to higher education, there is no guarantee that the Supreme Court will agree to consider lower court decisions as they are promulgated. At least as far as certiorari is concerned, the Court clearly has discretion to hear only those cases it wishes. The Court dismissed numerous Sunday closing cases for want of a substantial federal question prior to the Court's actual decision of the issue.<sup>49</sup> Recently, the Court again refused to hear cases challenging the validity of tax exemptions granted to religious organizations.<sup>50</sup> And, of course, the Court refused to hear the *Horace Mann* case.

#### IV. Analysis

When the Supreme Court ultimately decides a case directly challenging government aid to sectarian colleges and universities, it could decide—on the basis of *Schempp*, *McGowan*, and *Everson*—that any aid authorized by Congress on a nondiscriminatory basis to sectarian as well as other institutions is constitutional, on the ground that such aid serves a public purpose,

48. In a recent New York case, for instance, the state court of appeals overruled a lower court decision and held that the plaintiff had standing to challenge a New York statute providing textbooks to children in parochial schools. However, the court then found the statute constitutional under both the New York and Federal Constitutions. See *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967). A detailed discussion can be found in Note, 17 CATHOLIC U. L. REV. 242 (1967).

49. See Kurland, *supra* note 37, at 83.

50. See *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897, cert. denied, 385 U.S. 816 (1966).

The Court also refused to review a Vermont decision holding invalid the use of state funds to pay tuition to Catholic secondary schools for those children living in districts in which the state had not established public high schools. See *Swart v. South Burlington School Dist.*, 122 Vt. 177, 167 A.2d 514, cert. denied, 366 U.S. 925 (1961). The Court also denied review of an Oregon Supreme Court decision striking down a state grant of textbooks to parochial school students. See *Dickman v. School Dist.*, 232 Ore. 238, 366 P.2d 533 (1961), cert. denied, 371 U.S. 823 (1962).

does not interfere with the free exercise of one's religion, and does not directly prefer or assist either the religious or the non-religious. Citing language from the same cases, the Court could also decide that any financial aid to a church-affiliated institution is pro tanto an aid to that religion, and therefore a violation of the establishment clause. Or the Court could establish a "secularity" test for each institution to be applied on an ad hoc basis.

The strongest arguments support the position that federal aid to church-supported higher education for educational purposes is constitutional. As a beginning point, the Court could find that a college's church affiliation did not render the college itself "religious," and that, therefore, aid to the college was not direct aid to a religion.

In *Bradfield v. Roberts*,<sup>51</sup> in 1899, the Court held that supplying Congressional funds to a Catholic hospital did not raise a constitutional question, since the hospital's charter made no reference to religion. The hospital held property in its own name and there was no showing that religion was a criterion for treatment. Similarly, though not involving the first amendment, the Court held in *Speer v. Colbert*<sup>52</sup> in 1906 that a gift under a will to Georgetown College, supported by the Catholic Church, did not violate a District of Columbia statute forbidding gifts and devises for religious purposes, unless made at least one month before the death of the donor or the testator.

The fact that ultimate ownership of property held by Catholic universities rests, by canon law, with the Holy See would present no particular problem. In an analogous area, a federal court of appeals has held that granting a radio license to Loyola University was not a grant to an alien, a representative of an alien, or a party controlled by an alien, notwithstanding the ultimate control possibly exercised by the Superior General of the Society of Jesus and ultimately by the Pope.<sup>53</sup>

Even should the Court hold that religious affiliation made a grant to a university subject to the strictures of the first amendment, it does not follow that any aid, whether direct or indirect, is unconstitutional. In *Everson* and *McGowan*, a majority of the Court found that the state's secular purpose was served by the challenged statutes and, therefore, any incidental aid to religion was constitutionally unimportant. In those cases, the Court carefully reviewed the purpose of the legislation to determine that it primarily sought to serve some public good and did not coerce or restrict any individual in the exercise of his liberties.

In addition, Chief Justice Warren's opinion in *Braunfeld* and the Court's opinion in *Schempp* clearly state that the Court will determine whether any social purposes are furthered by a statute before declaring it in violation of

51. 175 U.S. 291 (1899).

52. 200 U.S. 130 (1906).

53. *Noe v. FCC*, 260 F.2d 739 (D.C. Cir. 1958).

the first amendment. As the Court stated in *Zorach*, the first amendment "does not say that in every and all respects there shall be a separation of Church and State."<sup>64</sup>

Under these cases, one can establish that federal spending in support of higher education serves a valid and important public purpose with any benefits to religion being incidental to this general and all-inclusive purpose. The need for further construction of academic facilities in the country is generally conceded by all concerned<sup>55</sup> and the Higher Education Facilities Act applies equally to all colleges and universities. Since approximately 800 of the 2,000 institutions of higher education in the United States are church-affiliated,<sup>56</sup> it is not unreasonable for the federal government to decide to meet the increasing demands for improved university facilities and teaching by making grants across the board, rather than trying to satisfy the demand while at the same time ignoring 40 percent of the relevant institutions.

In fact, to pass a general education bill while denying aid to religious colleges, in effect discriminates against secular institutions on the basis of religion. The Court in *Everson* specifically stated that those supporting a religion could not be excluded from receiving the benefits of public welfare legislation "*because of their faith, or lack of it . . .*"<sup>57</sup> On the same theory, the Court recently struck down a state denial of unemployment compensation to a Seventh Day Adventist who would not work on a Saturday.<sup>58</sup> Similarly, Justice Brennan, concurring in *Schempp*, stated that the state cannot interfere with a person's choice of educational institutions "by diminishing the attractiveness of either alternative."<sup>59</sup>

Viewed another way, requiring the elimination of all vestiges of religion and religious observance from the college atmosphere before there can be federal aid, amounts to an establishment of secular humanism. As Professor Brown has stated:

One of the most significant aspects of any culture is its prevailing moral values. It is not so much a responsibility of an educational system that it should foster, produce, or inculcate (as you will) some moral values (or amoral values, possibly) as an inevitability that it should do so. . . . It is the orthodoxy of more than one creed that morals *are* theistically based . . . . To parents holding such beliefs, a school is not being neutral when it inculcates the idea that moral values do or may have a non-theistic base. Such a teaching

54. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

55. See, e.g., S. REP. NO. 557, 88th Cong., 1st Sess. 2-6 (1963).

56. 109 CONG. REC. 14954 (1963) (remarks of Representative Powell); 109 CONG. REC. 19495 (1963) (remarks of Senator Ribicoff).

57. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947); See generally Kauper, *Religion, Higher Education and the Constitution*, 19 ALA. L. REV. 275, 292-93 (1967).

58. *Sherbert v. Verner*, 374 U.S. 398 (1963).

59. *School Dist. v. Schempp*, *supra* note 31, at 242.

to them is not neutral, but is as much in conflict with their beliefs as a teaching of a theistic moral system would have been to Mrs. Murray's atheism.<sup>60</sup>

To hold that some private universities are too religiously oriented to receive government funds will inevitably involve the courts in inquiries into what is a religion and what are religious practices. The experiences we have had with such questions when related to conscientious objectors and tax-exempt organizations have been anything but encouraging. With people asserting that the LSD cult is a religion, the field is not becoming clearer. The net result of a case-by-case inquiry into the religious nature of every private college receiving federal aid would be an unseemly series of court battles with judges expected almost overnight to become biblical scholars and religious authorities, as well as educational experts. Even with colleges supported by known religions, as most sectarian colleges are, there is the problem of analyzing the degree of church affiliation and contact, facts that vary for many church-affiliated schools. Is the Court to look to the number of religious officials on the board of trustees and, if so, what percentage is sufficient to taint the university? How many non-religious faculty members must there be before federal aid is constitutional? How often can students be requested to attend church or chapel services and what kinds of services can they be?

Also, whatever aid a religion does receive from federal spending for higher education is difficult to distinguish from the aid religious institutions obtain from the state through means of various tax exemptions and tax deductions for charitable contributions. If anything, aid by means of tax exemptions is more suspect, since it redounds to the benefit of the church directly, rather than indirectly through affiliated universities. Yet state and local property tax exemptions have long been the rule. In fact, many of these exemptions were based on the historical precedent of an established state religion.<sup>61</sup> The Supreme Court has continually refused to review this issue.<sup>62</sup>

Some commentators have argued that the benefits received from tax exemptions by religious organizations are only indirect.<sup>63</sup> This seems to be semantic quibbling, since the ultimate benefit to the religious organization is

60. Brown, *Quis Custodiet Ipsos Custodes?*—The School-Prayer Cases, 1963 THE SUP. CT. REV. 1, 12-13.

61. See, Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461, 462 (1959); Louisell & Jackson, *Religion, Theology, and Public Higher Education*, 50 CALIF. L. REV. 751, 779 (1962); Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144, 145, 148 (1949).

62. See *Lundberg v. County of Alameda*, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed sub nom.* *Heisey v. County of Alameda*, 352 U.S. 921 (1956); *Murray v. Comptroller of the Treasury*, *supra* note 50.

63. See Louisell & Jackson, *supra* note 61; Paulsen, *supra* note 61, at 149; Note, 58 COLUM. L. REV. 417 (1958). But see Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 COLUM. L. REV. 968, 985 (1949); Note, *Higher Education Facilities Act—Constitutionality of Federal Financial Aid to Church-Related Colleges*, 77 HARV. L. REV. 1353 (1964).

the same whether the state assesses the taxes and then refunds them in a direct grant or simply never collects the taxes in the first place.<sup>64</sup> Tax exemptions for religious institutions are part of our history, however. At the time of the adoption of the first amendment, numerous states had established religions with direct contributions to their support, as well as tax exemptions.<sup>65</sup> While direct support ceased in the early 1800's, later state constitutional provisions prohibiting aid to religion have universally been interpreted to permit the granting of tax exemptions.<sup>66</sup>

In addition, to tax a religion or a religious institution may infringe the public's freedom of religion to the extent that it makes it more difficult or expensive for people to participate in the religious exercises of their choice. Forcing churches and religious institutions to pay taxes on their property, especially that property located in the heart of large cities, would impose a great burden on the congregations. It could be argued, therefore, that it is one thing for a state not to place obstacles, such as taxes, in the way of religious exercises, but it is quite another for the state affirmatively to finance such activities. This argument can be supported by analogy to the cases where the Supreme Court has held, on the one hand, that use of public facilities, such as parks and streets, cannot be denied to religious proselytizers<sup>67</sup> and, on the other hand, that the state is forbidden to aid affirmatively in the propagation of any religious theory.<sup>68</sup> Nonetheless, to the extent that church property and income-producing activities are not taxed, while similar property and activities of secular institutions are taxed, religion has been aided as much as if direct support had been provided.

Supreme Court cases striking down state aid to religions are easier to distinguish than the tax exemption problem. All these cases involve secondary education and all involve state support of particular religious exercises. In some instances the Court talked of invasion of freedom of religion and in others in terms of establishment. As for freedom of religion, no one is compelled to attend a college or a university, at least not by law, and there is complete freedom as to which university to attend. As for establishment, providing government support to all institutions of higher education provides little state support and sanction of religious exercises. Many sectarian universities do not require attendance at whatever religious functions are held. Furthermore, a student of 17 to 21 years of age is more likely to have formulated any ideas he may have on religion and its relationship to his life before his

64. Of course, a university receiving a direct grant from the government benefits twice, once by the grant and once by the tax exemption.

65. Paulsen, *supra* note 61, at 148; Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 COLUM. L. REV. 968, 975, 991 n.147 (1949).

66. See, e.g., cases cited *supra* note 62.

67. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

68. See cases discussed in Sec. II in text, *supra*.



attendance at a sectarian college, than is a child attending a grammar or a secondary school. At the very least, a college student is in a better position to weigh various competing doctrines and to make a more independent decision than a child in grammar or secondary school. This not only leaves him free to choose, but provides the church with little additional support.<sup>69</sup>

The issue is not by any means clear, however. There is much language in the cases already quoted that can be used to support the view that aid to any church-affiliated university is impermissible. For instance, in *Everson*, which allowed government grants to parents whose children attended parochial schools, there are the oft-quoted statements that:

No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . . New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.<sup>70</sup>

Viewed functionally, the establishment clause was designed in part to avoid religious domination of, or interference with, government and to free the government from conflicting demands by religious bodies, and at the same time to protect against governmental control of religion; thus the metaphor of the "wall of separation between Church and State."<sup>71</sup> To be sure, aid to church-affiliated institutions is a fissure in the wall since religious groups, easily identified as such and acting in that capacity, will be encouraged to lobby and compete for government appropriations. It is not unreasonable to expect to hear claims of discrimination in allocations to religious colleges. In New York, for instance, there have been a number of allegations made recently that funds under the Elementary and Secondary Education Act have been inequitably divided between public and private schools.<sup>72</sup> And, at least in some areas of the country, there may well be some basis in fact for these claims. Also, aid to sectarian universities will allow Congress to control, to some extent, the nature of courses taught at universities receiving aid; there will be tremendous pressure on sectarian universities to conform to standards set. However, the church itself will still remain free to teach its dogma in any manner it sees fit; it may simply have fewer opportunities to do so.

69. See Kauper, *supra* note 57, at 278.

70. *Everson v. Board of Educ.*, *supra* note 57, at 16.

71. See Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949). A recent detailed analysis of the historical material is contained in Sky, *The Establishment Clause, The Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395 (1966).

72. N.Y. Times, Dec. 2, 1966, at 1, col. 2; N.Y. Times, Dec. 10, 1966, at 36, col. 6.

Nonetheless, while some degree of subjective feeling no doubt enters everyone's decision on this question, the state's greater interest in insuring the existence of the best educational facilities made available to the largest number of people would appear to override any dangers of religious intervention in government or government sanction and control of religion. The other choice is to watch a large number of private universities fade into mediocrity and perhaps out of existence.

One exception to this discussion should be noted. The equities change markedly if the university in question, rather than educating its students to assume general roles in society, educates them for specific roles in the service of the church. Divinity schools and schools preparing their students for religious orders, convents, and the like present a different picture from that just discussed. While the ministry is a noble calling, there is less of an overriding public interest in insuring federal aid to the education of a minister of a given religion than to the education of lay believers. While the Supreme Court should avoid adopting a rule that would require continual case-by-case litigation involving questions such as how many members of the board of trustees are members of the religious order, it can easily determine whether or not the purpose of the university is to train its students for service in the ministry or in similar activities.

Two Catholic women's colleges in the *Horace Mann* case were preparing their students for religious orders and, to use the *Everson* terminology, may approach the verge of constitutionality. Therefore, it would be prudent not to ignore the secular classification system involved for the first time in the widely publicized *Horace Mann* decision, since the Supreme Court, itself, could use similar factors as the basis for decision. These factors would also be relevant, of course, should the Court go even further and hold that aid to any religiously affiliated college is unconstitutional, since a college could still argue it was not sufficiently affiliated to be ineligible for aid. In the meantime, lower courts deciding similar problems will at least refer to the *Horace Mann* opinion, so that it is worthy of some detailed analysis.

#### V. *The Horace Mann League Case*<sup>73</sup>

The State of Maryland, under its policy of aiding universities in the construction of new facilities, made grants to four religiously affiliated colleges, two Catholic and two Protestant, for the construction of dormitories, dining halls, science buildings, and classrooms. Dealing initially with the first amendment, the Maryland court paid lip-service to the principle that it is constitutionally permissible for a religious institution to derive some aid from the state so long as it is only incidental to a legitimate, general plan established for the

73. *Horace Mann League of United States v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51, cert. denied and appeal dismissed, 385 U.S. 97 (1966).

public welfare. However, rather than first determining whether there was such a primary public purpose involved in the state grants before it, the Maryland court immediately set itself the task of determining how "religious" the various institutions were. The assumption of the majority appears to have been that, once it was determined that a university was sectarian, any aid, no matter how incidental, was unconstitutional.<sup>74</sup> This assumption is not compelling and is inconsistent with the court's own statement that some aid to religious institutions is permissible.

The Maryland court set forth a number of factors which were said to be "significant in determining whether an educational institution is religious or sectarian." These factors were:

- (1) *the stated purposes* of the college;
- (2) *the college personnel*, which includes the governing board, the administrative officers, the faculty, and the student body (with considerable stress being laid on the substantiality of religious control over the governing board as a criterion of whether a college is sectarian);
- (3) *the college's relationship with religious organizations and groups*, which relationship includes the extent of ownership, financial assistance, the college's memberships and affiliations, religious purposes, and miscellaneous aspects of the college's relationship with its sponsoring church;
- (4) *the place of religion in the college's program*, which includes the extent of religious manifestation in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college's own church and the place of religion in the curriculum and in extra-curricular programs;
- (5) *the result or "outcome" of the college program*, such as accreditation and the nature and character of the activities of the alumni; and
- (6) *the work and image of the college in the community*.<sup>75</sup> (Emphasis and use of margin added.)

Upon its analysis, the court found that the two Catholic and one of the Protestant colleges were "sectarian" and, therefore, ineligible for state construction grants.

74. The Maryland court did begin by quoting an earlier case for the proposition that if both secular and religious ends were served by the statute, it would be necessary to determine "*whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.*" *Id.* at 664, 220 A.2d at 61. However, the court never reached that point since its finding that three of the colleges were "sectarian" led to the conclusion that the state's primary purpose, therefore, was to aid religion, a purpose not allowed by the first amendment.

75. *Id.* at 672, 220 A.2d at 65-66.

Taking the six factors individually, the court isolated the following information about each of the colleges. Under stated purposes, Hood College, for which aid was ruled constitutional, promulgated religious statements that were not "of a fervant, intense or passionate nature," but were largely historical. On the other hand, Western Maryland College, the Methodist institution held ineligible for aid, had stated purposes that "include religious objectives to a considerable extent," the college characterizing itself as a "religiously oriented institution." The "basic purpose" of the college was to provide the best in education "within the framework and atmosphere of the verities and values of our Christian faith." The two Catholic colleges, Notre Dame and St. Joseph's, both expressed deep and intense religious purposes.

The college personnel at Hood were of no particular religious bent. Only seven of the 35 members of the board of trustees were church members, and there were no sectarian requirements for the faculty or administration. Nine faiths were represented on the faculty and only 10 of the 55 faculty members and 89 of the 675 students were members of the United Church of Christ. Twenty-seven of the 40 members of the board of trustees at Western Maryland were Methodists and the regulations required one-third of them to be; the administrative officers were almost entirely Protestant and 30 of the 41 faculty members were Methodists. The court stressed that all presidents of the university had been Methodists. The administrations at the two Catholic colleges were almost entirely composed of members of the religious orders; 10 percent of the students at Notre Dame were candidates for the religious order and 97 percent of the students were Catholic, while virtually 100 percent of the students at St. Joseph's were Catholic.

Hood College had only tenuous ties with its affiliated church: the church provided only 2.2 percent of the college's support, and there was no church control over the governing body. Other than the number of Methodists on the board of trustees, the court did not isolate any other factors of church control of Western Maryland. The court noted, however, that the governing boards at the two Catholic colleges were controlled by the religious orders, and that the colleges were owned and substantially assisted by these orders.

The court directed much of its attention to the place of religion in life at each university. At Hood College the only physical religious structure was the chapel, which was open to all religions; religion occupied no dominant place in the educational program; there was no attempt by college personnel to proselytize the students; there was no required attendance at religious observances and the course in religion was not geared to any particular sect. At Western Maryland College many students became seriously interested in religion for the first time at the university, and scholarships were given to the children of Methodist ministers and to pre-ministerial students of the Methodist faith. At the two Catholic colleges, the institutions were trying

to inculcate their entire educational program with their deep religious purpose, and each class in the new buildings was opened with a prayer. As for the "outcome" of the college program, the court noted the religious interest generated at Western Maryland and the fact that at one of the Catholic colleges 10 percent of the students were candidates for the religious order.

Looking at the image of each college, the court found that at Hood, various civic and religious groups were allowed to use the campus during the summer, and there was no substantial activity of a religious nature among the alumni, the public image at the university not being "religious." At Western Maryland College, however, the campus was made available at cost only to the Methodists. The campuses at the Catholic colleges were closed to non-Catholic groups and the alumni were active religiously, the colleges having intensely religious images.

The Maryland court then held that there was no violation of the separation between church and state under the Maryland Constitution, citing the fact that only Maryland and Vermont, of all the states, did not have explicit provisions prohibiting the appropriation of public money to schools controlled by religious organizations. The court also relied upon the public purpose of the grant, the dissenters using that statement to argue that the same reasoning should be applied to the first amendment.

The Maryland court's subsequent decision in *Truitt v. Board of Public Works*<sup>76</sup> raises some doubt about the *Horace Mann* decision. In *Truitt*, owners of Maryland real estate challenged the state grant of low interest loans for hospital construction by hospitals directed or owned by religious organizations. The court found that there was no question that the expenditure of state funds was for a public purpose and that, under *Horace Mann*, there was no violation of the Maryland Constitution.

Turning to the first amendment, the court found that, while there was some benefit to religious groups which otherwise would have to expend their monies for the construction, the state action was primarily to promote the general welfare and not to aid religion. According to the court, the hospitals received the funds not because they were sectarian, "but because they are, or will be, part of the state's hospital resources." The court further noted that aid to hospitals had been a policy and practice of government for many years, and that the hospitals had a completely non-sectarian policy as to admission and treatment of patients and the hiring of personnel. Analogizing to the Sunday closing cases, the court found that any remaining vestiges of religious influence were retained solely for the convenience of the patients and their families, there being no attempt to promote a particular religious belief.

76. 243 Md. 375, 221 A.2d 370 (1966).

All of the hospitals in question had chapels as part of their facilities and one hospital allowed only Catholic services to be held. The court relied upon evidence presented to the trial court that all of the chapels had been retained to a large extent for their therapeutic value. The court finally observed that to exclude a hospital because of its religious affiliation would result in discrimination on the grounds of religion and be an infringement of the free exercise of religion.

Many of these same arguments can also be used to support government aid to higher education. In fact, a majority of the Maryland court may even think so. The concurring judge in *Truitt* did not sit on the *Horace Mann* case, and his opinion in *Truitt* strongly implied that he thinks *Horace Mann* was decided incorrectly.<sup>77</sup>

#### VI. Criteria for Analyzing Church-Affiliated Universities

As noted earlier, the strongest arguments favor a Supreme Court ruling upholding the constitutionality of government aid to church-affiliated universities, so long as the universities are not training students for careers in the ministry or other direct service for the church. On the other hand, the Court may broaden the prohibition against government aid to include universities with a pronounced religious orientation such as the two Catholic colleges in Maryland. In this event, the criteria discussed by the Maryland court may serve as a starting point for analyzing a university's religious orientation and connection. The Maryland decision, however, does not indicate which factors are sufficient, or which are necessary for a finding that a college or university is too religiously oriented to receive government aid, and it is difficult to separate the important factors from the trivial in the Maryland decision.

To the extent that the impetus behind the adoption of the first amendment was the fear that government support would lead to the dominance by a given religion or group of religions, the danger in aiding a religious institution is the danger of substantially assisting a church in gaining an increased number of supporters. It thus follows that the constitutional focus should be on the relationship of the university to the student. This will allow a court to determine whether the facilities are devoted to the general good of education, rather than any secular advantage.

Looking to the many factors delineated in the Maryland Court of Appeals' opinion, the most relevant would seem to be the nature of the university's personnel, the place of religion in the college program, and the work of the college in the community. The nature of the university's stated purpose, its ownership, the financial assistance it receives, its alumni activities, and its image in the community are not particularly relevant, from the standpoint

77. *Id.* at 411-13, 221 A2d at 392.

of the student, the education he receives, and the influence the church exercises over him.

It might also be questioned whether one need look to the "substantiality of religious control over the governing board," without more. What is important is not the fact of control, but the results of control. It is conceivable that a university allegedly controlled by a religious organization would not necessarily bring religious pressures to bear upon the student body. Many colleges, as they go through the transition from being sectarian to becoming basically secular, pass through stages in which there is nominal control and ownership by religious organizations, but in which any narrowly sectarian impact upon a given student is negligible. Government aid to hospitals owned and controlled by a religious order has been upheld where the proselytizing effort is minimal.

Of course, in many situations, the fact of religious control over the governing board of a university will be reflected in the religious nature of the activities of the college. Furthermore, if a board of trustees that has complete power over a university is almost entirely composed of members of one church and is bound by its ecclesiastical law, a court might still be reluctant to allow government aid.

It would be possible, however, for such a board of trustees to delegate a large portion of its control over the functioning of the university to the administration, although this need not necessarily include the relinquishment of ownership of the physical plant or control of its disposition. If the administration and faculty were predominantly laymen, and the activities of the university were not saturated with religious overtones, it could then be argued that the impact on a student's life at the university was religious only to the extent that he desired to make it so, especially if the university welcomed students of other denominations and faiths.

This may still be insufficient, since courts generally are more accustomed and anxious to look for easily ascertainable factors, such as the number of trustees who are members of a given religion, rather than subtle manifestations of concepts, such as the university's religious impact on a student. Thus, the Maryland court greatly emphasized the elements of church control. And, as discussed earlier, active ownership and control of a university by a religion means that the religious body, as such, will generally be involved in competition for government funds; that fact alone may be sufficient to cause a court to find a violation of the first amendment.

Another alternative would be for the board of trustees to retain ownership of the religious property of the university, while a totally separate and independent corporate body, established to own and maintain the remaining physical plant of the university, would oversee, control, and plan all activities that take place thereon. Such an arrangement would demonstrate

that the activities of the university were separate from the functions and doctrine of the church, and would remove the religious organization from the spirited competition for government funds.

It is worth noting at this point that, even if a university should be ineligible to receive grants from the government for building purposes, direct government aid to students will probably continue to be permissible. The G.I. Bill, the National Defense Education Act, and state scholarships reimburse students for expenses they would otherwise have to bear. To the extent that such students are then more likely to attend religious institutions, these universities, and therefore their religions, are supported. In this regard, the analogy to *Everson* seems persuasive. It will be remembered that in this case, the Supreme Court upheld state reimbursements to parents for transportation of children to church-supported schools. Admittedly, there was language in the decision concerning the "public welfare" nature of the aid, since this was an attempt to insure that all children arrived at school safely. Aiding all eligible college students, however irrespective of religion, to obtain a higher education is certainly in furtherance of the public welfare.

While there are state cases holding aid to students unconstitutional,<sup>78</sup> such cases generally involve providing elementary students with materials such as books which the school itself would otherwise have been obliged to provide. In that situation, the religious school was being relieved of an obligation it otherwise would have met, since children in elementary and secondary schools generally do not buy their own textbooks. That is, in the textbook situation, without government aid the religious school itself would be spending money; whereas, insofar as loans and scholarships are concerned, without government aid the student would be required to spend the money. The assumption in this discussion, of course, is that sectarian schools have a fixed number of scholarships or a limited amount of money to award every year, and that government programs supplement those awards. If there were a situation, which is hard to imagine, where the university provided all students with free tuition or scholarships, the government program would then relieve the university of the burden of providing such funds, rather than the student.

The status of government loans to a university for building facilities would appear to be the same as that of direct grants. It could be argued that the government is getting a fair return or at least some return on its money, and that all of the funds are being returned to the government sooner or later so that the government, in effect, is not aiding the university. However, by the terms of the Higher Education Facilities Act the university is eligible for such loans only upon a showing that a similar loan could not be obtained

78. See cases cited in the Note, *supra* note 8, 17 CATHOLIC U. L. REV. 242, 243, n.11.



elsewhere. To this extent, the university is aided, perhaps substantially. On the other hand, the amount of such aid is certainly less than in the situation where the government funds the building of a particular facility. Any governmental aid involved, therefore, might be held to be too minimal to violate any constitutional proscriptions.

In conclusion, it is clear that an overriding problem facing religious universities and the government is the first amendment and the relationship between government and religion that it delineates. On the one hand, there is an ever increasing need for financial support if these universities are to maintain their place in the academic community in the face of continuing pressure to broaden their base of support, intellectually as well as financially. On the other hand, private institutions, whether religious or not, no doubt wish to remain free to determine their own destinies and retain autonomy over their internal affairs.

Concurrently, federal and state governments face an increasing need to supply the country with more educational facilities. In light of the large number of church-supported universities in the United States, this inevitably means that the government must consider aiding those institutions; yet, there is a strong desire on the part of legislators to avoid involvement in religious controversies or dominance by sectarian groups.

There are no conclusive answers to any questions discussed herein. There is no assurance that the Supreme Court will, in the near future, decide the constitutionality of government aid to religious universities. If the Court does take such a case, the decision will probably be to continue to permit aid to most institutions that are church related, so long as the aid to any particular institution generally comports with the legislative purpose to increase the facilities available for general higher education. Nevertheless, aid to some schools may not be allowed, and it is unclear what test the court will propound to decide which schools are ineligible.

What is clear, however, is that the forces demanding an increase in educational facilities and the public's greater awareness of the place of the first amendment in our structure of government will keep the question of the relationship of state and federal governments to sectarian institutions before the courts and before the legislatures. It is therefore none too soon for church-affiliated colleges and universities to begin a serious consideration of their institutions, their place as part of higher education in the nation, and the place that religion should play in their educational processes.